(1) 95-590

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Petitioner,

v.

MIKE SMITH PONTIAC, GMC, INC., TERRY TAYLOR, TERRY TAYLOR INVESTMENTS, INC., AND BILLY GRUBBS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment and the *Noerr-Pennington* doctrine shield from liability a party who files in good faith an administrative complaint seeking a determination from a state agency about the propriety of a proposed franchise transfer.

2. Whether the court of appeals in this diversity case erred in refusing to certify to the state supreme court dispositive state law issues that were novel and will have a dramatic impact on the state's motor vehicle dealers and franchisors.

RULE 29.6 STATEMENT

Petitioner Mercedes-Benz of North America, Inc. (Mercedes) has no subsidiaries other than wholly owned subsidiaries and has issued no publicly traded shares. Mercedes is a wholly owned subsidiary of Daimler-Benz North America Corp., which in turn is wholly owned by Daimler-Benz A.G.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mercedes-Benz of North America, Inc. (Mercedes) respectfully requests the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 3a-17a) is reported at 32 F.3d 528. The district court's order granting respondents' motions for partial summary judgment (App., *infra*, 22a-31a) and final judgments (App., *infra*, 18a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1994, and a petition for rehearing was denied on July 27, 1995 (App., *infra*, 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Florida Automobile Dealer's Act (Act), Chapter 320 of Florida Statutes (1985), provides in pertinent part:

> **Section 320.641 Unfair cancellation of franchise agreements.—**
>
> (1)(a) An applicant or licensee shall give written notice to the motor vehicle dealer and the department of the licensee's intention to discontinue, cancel, or fail to renew a franchise agreement or of the licensee's intention to modify a franchise or replace a franchise with a succeeding franchise, * * * at least 90 days before the effective date thereof, together with the specific grounds for such action.
>
> * * * * *
>
> (3) A motor vehicle dealer whose franchise agreement is discontinued, canceled, not renewed, modified, or replaced may, within the 90-day notice period, file with the department a verified complaint for a determination of whether such action is an unfair or prohibited discontinuation, cancellation, nonrenewal, modification, or replacement.
>
> * * * * *
>
> **Section 320.643 Transfer, assignment, or sale of franchise agreements.—**
>
> (1) A motor vehicle dealer shall not transfer * * * a franchise agreement to another person unless the dealer first notifies the licensee of his decision to make such transfer, by written notice setting forth the prospective

transferee's name, address, financial qualification, and business experience during the previous 5 years. The licensee shall, in writing, within 60 days after receipt of such notice, inform the dealer either of his approval of the transfer, * * * or of the unacceptability of the proposed transferee, setting forth the material reasons for the rejection. If the licensee does not so inform the dealer within the 60-day period, its approval of the proposed transfer is deemed granted. * * * Notwithstanding the terms of any franchise agreement, the acceptance by the licensee of the proposed transferee shall not be unreasonably withheld. For the purposes of this section, the refusal by the licensee to accept a proposed transferee who is of good moral character and who otherwise meets the written, reasonable, and uniformly applied standards, if any, of the licensee relating to the business experience of executive management required by the licensee of its motor vehicle dealers is presumed to be unreasonable.

(2)(a) * * * [A] licensee shall not * * * fail or refuse to give effect to, prevent, prohibit, or penalize, * * * any motor vehicle dealer * * * from selling, assigning, transferring, alienating, or otherwise disposing of, in whole or in part, the equity interest * * * in such motor vehicle dealer to any other person or persons, * * * unless the licensee proves at a hearing pursuant to this section that such sale, transfer, alienation, or other disposition is to a person who is not * * * of good moral character. A motor vehicle dealer * * * who desires to sell, assign, transfer, alienate, or otherwise dispose of any interest in such motor vehicle dealer shall notify, or cause the proposed transferee to so notify, the licensee, in writing, of the identity and address of the proposed transferee. A licensee who receives such notice may, within 60 days following such receipt, file with the department a verified complaint for a determination that

the proposed transferee is not a person qualified to be a transferee under this section. * * * The department shall determine, and enter an order providing, that the proposed transferee either is qualified or is not and cannot be qualified for specified reasons; or the order may provide the conditions under which a proposed transferee would be qualified. If the licensee fails to file such verified complaint within such 60-day period or if the department, after a hearing, dismisses the complaint or renders a decision other than one disqualifying the proposed transferee, the franchise agreement between the motor vehicle dealer and the licensee shall be deemed amended in accordance with the determination and order rendered * * *.

* * * * *

Section 320.697 Civil damages.—

Any person who has suffered pecuniary loss or who has been otherwise adversely affected because of a violation by a licensee of §§ 320.60-320.70 * * * has a cause of action against the licensee for damages and may recover damages * * * in an amount equal to 3 times the pecuniary loss * * *.

STATEMENT

A. The Automobile Dealer's Act

Under the Automobile Dealer's Act, Florida law confers special rights and imposes special obligations on automobile dealers and their manufacturer-franchisors (or, as they are referred to in the Act, "licensees").[1] The statute was enacted

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[1] "Within the context of Florida's dealer protection scheme, a 'licensee' includes the manufacturers, distributors and importers that are required to be licensed by the Department [of Highway Safety and Motor Vehicles] in order to have their vehicles sold in th[e] state." *Mercedes-Benz of North Am., Inc.* v. *Mike Smith*

to "ensur[e] fair dealing between motor vehicle manufacturers, motor vehicle dealers, and motor vehicle consumers." *Dick Winning Chrysler* v. *Chrysler Motors Corp.*, 750 F.2d 895, 898 (11th Cir. 1985).

Section 320.641(a) of the Act provides that a licensee must give a dealer 90 days' notice of a proposed termination of the dealership franchise. A dealer may, within the 90-day notice period, file an administrative complaint under Section 320.641(3) of the Act with the Florida Department of Highway Safety and Motor Vehicles (DMV) challenging the termination as unfair or prohibited.

Any dealer that wishes to sell or transfer its franchise must give the licensee 60 days' notice of the proposed transfer under Section 320.643(1). The licensee may either approve the transfer or file a complaint with the DMV objecting to the transfer under Section 320.643(2)(a). If the licensee fails to file a complaint under Section 320.643(2)(a), "the franchise agreement between the motor vehicle dealer and the licensee shall be deemed amended" and the transfer is automatically authorized.

The standards for reviewing a proposed transfer are not precisely defined in the statute. Section 320.643(1) provides generally that the acceptance by a licensee of a proposed transferee must "not be unreasonably withheld." An objection to "a proposed transferee who is of good moral character and who otherwise meets the written, reasonable, and uniformly applied standards" of the licensee relating to "business experience" is "presumed to be unreasonable." *Ibid.* Such statutory presumptions are rebuttable under the Florida constitution. *Straughn* v. *K & K Land Management, Inc.*, 326 So.2d 421, 424 (Fla. 1976).

Pontiac, GMC, Inc., 561 So.2d 620, 623 n.5 (Fla. Dist. Ct. App.), rev. denied, 574 So.2d 142 (Fla. 1990). Mercedes is a "licensee." *Ibid.*

Finally, Section 320.697 authorizes a civil action by any "person who has suffered pecuniary loss or who has been otherwise adversely affected because of a violation by a licensee of §§ 320.60-320.70." The statute allows a prevailing plaintiff to "recover damages * * * in an amount equal to 3 times the pecuniary loss." *Ibid.*

B. Factual and Procedural Background

1. In 1983 respondent Mike Smith Pontiac, GMC, Inc. (MSP) and Mercedes entered into a franchise agreement that permitted MSP to sell and service Mercedes automobiles. Jerome Ginsburg owned 75% of MSP's stock and Mike Smith owned 25% of the stock. After a dispute between the two owners of MSP in 1985, Ginsburg ousted Smith from the dealership. In response, Mercedes invoked a provision of the franchise agreement providing for termination of the franchise in the event any disagreement between the dealer operators and owners adversely affects the dealer's business and continues for three months after Mercedes notifies the dealer that the disagreement must be resolved. App., *infra*, 5a, 23a-24a. By letter dated July 1, 1985, Mercedes notified Ginsburg and Smith that their dispute must be resolved within 90 days to avoid termination. See *Mercedes-Benz of North Am., Inc.* v. *Mike Smith Pontiac, GMC, Inc.*, 561 So.2d 620, 621 (Fla. Dist. Ct. App.), rev. denied, 574 So.2d 142 (Fla. 1990).

Smith sued MSP and Ginsburg in September 1985, alleging that he had been illegally ousted from the dealership and deprived of his 25% ownership interest in MSP. *Mercedes-Benz*, 561 So.2d at 621 n.1; D. Ex. 988.[2] On October 23, 1985, Mercedes notified MSP of its intent to terminate the franchise agreement effective January 31, 1986,

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[2] Citations to D. Ex. and P. Ex. refer to the defendant's and the plaintiffs' trial exhibits.

because of the unresolved dispute between Ginsburg and Smith. App., *infra*, 5a.

MSP in turn filed a complaint with the DMV on January 16, 1986, under Section 320.641(3) of the Automobile Dealer's Act, alleging unfair termination of the dealership by Mercedes. *Mercedes-Benz*, 561 So.2d at 621. Before the final hearing on MSP's complaint,[3] MSP proposed a transfer of the franchise to Ronald Cutler and forwarded a sales agreement between it and Cutler to Mercedes for its consideration. App., *infra*, 5a, 24a; R. 29-192.[4] Mercedes objected to the proposed transfer on several grounds, most notably because Smith — who continued to claim a 25% ownership interest in MSP — had not executed the sales agreement, which did not provide for any payment to him for his interest in MSP, and he threatened to sue Mercedes if it approved the proposed transfer. D. Ex. 811; R. 35-103 to 35-106.

As a result of its concerns about the proposed transfer, Mercedes filed its own administrative complaint with the DMV on December 15, 1986, under Section 320.643(2)(a), challenging the transfer to Cutler. While this challenge to the Cutler transfer was pending,[5] the hearing officer presiding over MSP's objection to the termination of its franchise concluded on May 1, 1987 that the termination by Mercedes

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[3] Because MSP's complaint was "filed within the ninety day notice period," its Mercedes dealership agreement "continued in effect by operation of section 320.641(3), Florida Statutes (1985), until the termination dispute was resolved." *Mercedes-Benz*, 561 So.2d at 621-622 (footnote omitted).

[4] Citations in this form refer to the trial transcript.

[5] The hearing officer presiding over the Cutler transfer challenge stayed those proceedings pending entry of a final order in the MSP termination case. *Mercedes-Benz*, 561 So.2d at 622.

was proper. App., *infra*, 6a, 25a; *Mercedes-Benz*, 561 So.2d at 622.

Before the DMV acted on the hearing officer's determination that the termination of MSP was proper, MSP and Cutler modified their proposed transaction to meet the objections of Mercedes. *Ibid.*; App., *infra*, 25a. Among other things, Cutler agreed to indemnify Mercedes against any future liability to Smith, who continued to object to the transfer. R. 29-197. Mercedes approved the transfer as modified and executed a franchise agreement with Cutler. MSP then terminated its manager and gave control of the dealership to Cutler while Mercedes awaited confirmation of the closing of the transaction between MSP and Cutler. R. 29-298 to 29-299, 33-41, 33-61; D. Ex. 494. In the interim, Mercedes notified the DMV on May 19, 1987 that it had approved the transfer to Cutler and thereby rendered the termination action moot. App., *infra*, 6a, 25a; P. Ex. 210.

The following month, before final action was taken in either of the pending DMV administrative actions (the MSP termination proceeding or the Cutler transfer proceeding), MSP notified Mercedes that it was revoking the transfer to Cutler. Instead, MSP sought Mercedes' review of a proposed transfer of the dealership to yet another group, respondents Terry Taylor, Billy Grubbs, and Terry Taylor Investments, Inc. (collectively Taylor). App., *infra*, 6a, 25a.

Cutler immediately filed a request in the Cutler transfer proceeding before the DMV for an injunction prohibiting Mercedes from approving any other proposed transaction on the grounds that MSP had breached its agreement with Cutler. R. 34-106. Cutler also brought a state court action against MSP and Ginsburg seeking specific performance of their agreement to sell the Mercedes dealership to him and damages for tortious interference with Cutler's relationship with Mercedes. R. 29-201 to 29-202; D. Ex. 364.

On August 28, 1987, 60 days after receiving notice of MSP's proposed transfer to Taylor, Mercedes filed a complaint with the DMV challenging the Taylor transfer.[6] App., *infra*, 6a, 25a. Mercedes objected to the transfer "on the ground that by approving the transfer it would open itself up to potential lawsuits brought by either Cutler or Smith, each claiming to be the rightful dealer." App., *infra*, 6a. To resolve this complicated ownership dispute, Mercedes joined Smith and Cutler as parties to the proceedings — in addition to MSP and Taylor — so that all interested parties could be heard in one forum. P. Ex. 93; R. 29-203, 29-208.

The DMV on November 9, 1987, granted MSP's motion to dismiss Mercedes' complaint on the ground that it failed to challenge the qualifications of Taylor, the proposed transferee. App., *infra*, 6a. As a result, with no complaint interposed under Section 320.643(2)(a), the transfer of the dealership from MSP to Taylor "took place by operation of law." *Mercedes-Benz*, 561 So.2d at 624.[7]

On appeal, the Florida District Court of Appeal held that "[t]he transfer challenge envisioned in this section [320.643(2)(a)] must allege that the proposed transferee is not qualified under the terms of the statute." *Mercedes-Benz*, 561 So.2d at 624. The court noted that Section 320.643 mentions only moral character and business experience as "qualifications." *Ibid.* Because Mercedes' complaint did not challenge Taylor's qualifications on these grounds, and instead focused on its inability to reconcile the conflicting

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[6] Had Mercedes not filed a complaint by the 60th day after receiving notice, the transfer from MSP to Taylor would have automatically been consummated by operation of Section 320.643(2)(a).

[7] The Department dismissed as moot the prior administrative action brought by MSP to challenge the termination notification by Mercedes. 561 So.2d at 624.

claims to the franchise by Smith and Cutler, the court affirmed the dismissal of the complaint.[8] *Ibid.* The Florida Supreme Court denied review. 574 So.2d 142 (1990).

2. MSP thereafter brought this diversity action against Mercedes in federal district court. Among other claims for relief,[9] MSP sought treble damages under Section 320.697 of the Automobile Dealer's Act because Mercedes had allegedly "violated" Section 320.643 by filing a complaint with the DMV asking for a determination whether the proposed transfer from MSP to Taylor was proper under Florida law in light of the conflicting claims of Smith, Cutler, and Taylor. Mercedes answered and asserted, among other defenses, that a construction of the Automobile Dealer's Act to impose damages on Mercedes for petitioning for administrative relief from the DMV would violate the First Amendment to the U.S. Constitution. R. 1-8.

Mercedes also counterclaimed against MSP, and added Taylor as a party, seeking a declaration as to whether MSP or Taylor was Mercedes' authorized dealer. R. 1-8. Taylor asserted a counterclaim against Mercedes seeking treble damages under Section 320.697 of the Automobile Dealer's Act on the same grounds as MSP's claim under the statute. R. 2-20. Mercedes interposed its First Amendment defense and also challenged Taylor's standing to bring an action under Section 320.697.

On motions for partial summary judgment by MSP and Taylor, the district court held that the DMV's dismissal of

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[8] The court cited no precedents for its interpretation of the statute and expressly noted that other grounds for a challenge to a transferee, such as financial qualifications, may be permissible. 561 So.2d at 624.

[9] MSP also sought damages for breach of contract and tortious interference with contract. R. 1-1.

Mercedes' complaint challenging the Taylor transfer amounted to a "determination that Mercedes violated section 320.643 [and] is *res judicata*" on the issue. App., *infra*, 31a. The district court also held that Mercedes' First Amendment claim was no defense to liability under Section 320.643. R. 29-405, R. 31-214. The court instructed the jury to assess damages against Mercedes for the violation of this section, but allowed the jury to consider Mercedes' First Amendment right to petition the DMV in deciding whether to impose treble damages. R. 15-248-21, 22. The jury awarded damages of $2.5 million to MSP and $2.8 million to Taylor under Section 320.697, but declined to treble the amounts.[10] App., *infra*, 18a, 20a. Both sides appealed.

C. The Eleventh Circuit's Decision

Mercedes pressed its First Amendment defense in the court of appeals, invoking this Court's *Noerr-Pennington* doctrine. See *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Eastman R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Mercedes also challenged the district court's holding that *res judicata* precluded litigation of the question whether Mercedes had violated Section 320.643 and renewed its challenge to Taylor's standing as a prospective franchisee to bring an action under Section 320.697. Respondents appealed the district court's decision that Section 320.697 does not mandate treble damages.

Over a strong dissent, the court of appeals affirmed the district court's liability holding. As a preliminary matter, the court refused even to consider Mercedes' First Amendment defense — not even mentioning that the issue had been

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[10] As directed by the trial judge, the jury calculated respondents' compensatory damages. The jury found for Mercedes on all of the other liability issues that were submitted to it. App., *infra*, 18a-21a.

decided by the district court and extensively briefed and argued by the parties on appeal. The court of appeals proceeded to hold that Taylor had standing as a "potential franchisee" to bring an action under Section 320.697 because the statute authorizes suits by "[a]ny person who has suffered pecuniary loss" as a result of a violation of the Automobile Dealer's Act by a licensee. App., *infra*, 7a-8a. The court also affirmed the holding of the district court that Mercedes "violated" Section 320.643 and that the issue was *res judicata*. App., *infra*, 8a-12a. Finally, the court of appeals reversed the holding of the district court that treble damages are not mandated by Section 320.697. The court remanded the case to the district court "for a determination of appropriate damages." App., *infra*, 13a-15a.

Judge Hill dissented on the grounds that the important issues of Florida law decided by the court — whether a prospective franchisee has standing under Section 320.697, whether a licensee "violates" Section 320.643 by filing a complaint opposing a transfer on grounds other than the transferee's business qualifications and moral character, and whether treble damages are mandatory under the statute — should be certified to the Florida Supreme Court. The dissent questioned the correctness of the court of appeals' holding on these state law issues and observed that none of the issues had been addressed by the Florida courts. App., *infra*, 16a-17a.

REASONS FOR GRANTING THE PETITION

Faced with competing claims to an automobile dealership, and almost certain monetary liability if it guessed wrong, Mercedes chose — reasonably and in good faith — to seek an adjudication of its legal rights and obligations in the Florida administrative and judicial process. Rather than causing the automatic transfer of the dealership to Taylor, which might have been unlawful because of the interests of Smith and Cutler, Mercedes filed a complaint with the Florida DMV to resolve the ownership dispute and joined all of the claimants as parties. Because of this action, a divided panel of the

Eleventh Circuit has held that Mercedes is liable to respondents for more than *$15 million* in compensatory and punitive (treble) damages.

This result is incorrect, and inconsistent with the decisions of this Court and other courts, for two reasons. First, Mercedes cannot be subjected to damages liability under state law for exercising its First Amendment right to "petition the Government for a redress of grievances." Second, as Judge Hill explained in dissent, the panel erred in construing the Automobile Dealer's Act to impose massive and unforeseen monetary liability, rather than "us[ing the] valuable mechanism" of certifying these "important, heretofore undecided, questions of Florida law" to the Florida Supreme Court. App. *infra*, 16a-17a. Further review is plainly warranted.

I. THE COURT OF APPEALS' REJECTION OF PETITIONER'S FIRST AMENDMENT DEFENSE IS INCONSISTENT WITH THIS COURT'S PRECEDENTS AND CONFLICTS WITH OTHER CIRCUITS ON THE PROPER APPLICATION OF THE *NOERR-PENNINGTON* DOCTRINE

The court of appeals' rejection without analysis of Mercedes' First Amendment defense to liability under Section 320.697 of the Automobile Dealer's Act cannot be reconciled with this Court's long-standing precedents under the *Noerr-Pennington* doctrine and creates a circuit conflict over the proper application of that doctrine outside the antitrust context. Review by this Court is necessary to resolve that conflict and to address this important issue of constitutional law.

A. The First Amendment protects a person's right "to petition the Government for a redress of grievances." As articulated in this Court's decisions in *Noerr*, 365 U.S. at 136, *Pennington*, 381 U.S. at 669, and their progeny, the First Amendment shields from liability those who petition the

administrative, legislative, or judicial branches of government to influence "the passage or enforcement of laws." *Noerr*, 365 U.S. at 137; see *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-513 (1972) ("the right to petition extends to all departments of the Government").

In this case, Mercedes petitioned a state administrative agency, the Florida DMV, for a determination whether Taylor was a proper transferee under Florida law in light of the conflicting ownership claims by MSP, Smith, Cutler, and Taylor. At the time Mercedes filed its complaint: (1) a final order in the MSP termination proceeding had not yet been entered by the DMV; (2) Smith and Cutler each claimed to have rights to the dealership sought to be transferred by MSP; (3) Smith and Cutler each had objected to the proposed transfer to Taylor; (4) Smith's lawsuit against MSP and Ginsburg seeking a determination of his ownership rights was unresolved; (5) Cutler's lawsuit against MSP and Ginsburg for specific performance of the sales agreement for the dealership was unresolved; and (6) Cutler's motion before the DMV to enjoin Mercedes from approving any other transfer was pending. See pages 6-8, *supra*.

Had Mercedes not filed its complaint for a determination of the lawfulness of the transfer to Taylor, the transfer would have been effected automatically by operation of Section 320.643(2)(a), thereby subjecting Mercedes to potential liability to either Smith or Cutler. As the court of appeals concluded, Mercedes objected to the transfer "on the ground that by approving the transfer it would open itself up to potential lawsuits brought by either Cutler or Smith, each claiming to be the rightful dealer." App., *infra*, 6a; see also *Mercedes-Benz*, 621 So.2d at 624. Mercedes thus filed its administrative petition in good faith because it was unsure whether Taylor was a bona fide transferee for purposes of Section 320.643 when neither Smith nor Cutler, who claimed interests in the dealership, had consented to the transfer.

The precise situation confronting Mercedes was not specifically addressed by Section 320.643 or any other section of the Automobile Dealer's Act. Accordingly, Mercedes concluded that Florida law gave it no reasonable alternative but to file a complaint against the proposed MSP-Taylor transfer and join Smith and Cutler as parties to the proceeding so that all interested parties could assert their claims in one forum and the DMV could determine the appropriate course of action for Mercedes.

The First Amendment clearly protected Mercedes' decision to petition the Florida DMV for relief in these circumstances. This Court expressly held in *California Motor Transp.*, 404 U.S. at 510-511, that the First Amendment right recognized by the *Noerr-Pennington* doctrine allows a party to "use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." This right is "among the most precious of the liberties safe-guarded by the Bill of Rights." *United Mine Workers* v. *Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967).

The First Amendment right to petition government agencies for redress encompasses the institution of litigation that seriously affects substantive (and legally protected) interests of other parties. In *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 742-743 (1983), for example, the Court held that the First Amendment protected the filing of a well-founded lawsuit by an employer against its employees even though the lawsuit "would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights" under the federal labor laws.

Moreover, a party need not prevail in litigation to maintain its First Amendment protection. Only "sham" litigation that is "objectively baseless" is outside the First Amendment. *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920, 1923

(1993). As this Court admonished in *Professional Real Estate Investors*, courts should not conclude that a defendant's action was unreasonable just because it lost the litigation that forms the basis for the plaintiff's suit. Rather, they must remember that "'[e]ven when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.'" 113 S. Ct. at 1928 n.5 (citation omitted). Only an action that is *both* "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" *and* subjectively motivated as "'an attempt to interfere *directly* with the business relationships of a competitor'" loses its First Amendment immunity. *Id.* at 1928 (quoting *Noerr*, 365 U.S. at 144).

In this case, Mercedes' complaint was not "objectively baseless." The filing of an administrative action was the only reasonable course open to Mercedes, and the Automobile Dealer's Act did not expressly preclude such a filing. To be sure, the DMV and the Florida District Court of Appeal subsequently held that the DMV had no jurisdiction to adjudicate Mercedes' action because its complaint did not challenge Taylor's moral character or business experience. See pages 9-10, *supra*. But the Florida appellate court did not cite any precedent for this holding and expressly noted that there may be other grounds for a challenge to a franchise transfer not enumerated in the statute. See 561 So.2d at 624; page 10, *supra*. Mercedes' DMV complaint was therefore not "objectively baseless" when it was filed.

In any event, as the court of appeals expressly found, Mercedes certainly had no subjective intent to interfere with respondents' business relationships by bringing an administrative proceeding before the DMV. Mercedes filed its complaint only to protect itself from "lawsuits brought by either Cutler or Smith, each claiming to be the rightful dealer." App., *infra*, 6a; see also *Mercedes-Benz*, 621 So.2d at 624. Mercedes' administrative litigation was thus instituted

entirely in good faith (hence the jury's decision not to award treble damages in this case), and respondents have offered no proof to the contrary.[11]

In sum, Mercedes' conduct was at the core of the First Amendment right protected by the *Noerr-Pennington* doctrine: petitioning an administrative agency for an interpretation and enforcement of the law. This activity — the good faith filing of a DMV complaint seeking administrative action — was the sole basis for Mercedes' liability under Section 320.697 in this case.[12] The Eleventh Circuit's refusal to address this important issue and protect fundamental First Amendment rights is contrary to this Court's binding precedents and merits plenary review.

B. The court of appeals brushed aside Mercedes' First Amendment claim in response to an argument by MSP that the *Noerr-Pennington* doctrine is inapplicable to this case because it "applies only to litigation involving business relationships between competitors and anti-competitive activities covered under state and federal statutes." Answer and Reply Brief of the Appellant, Mike Smith Pontiac, GMC, Inc. 25-26. This assertion is inconsistent with decisions both

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[11] Respondents have the burden of proving that Mercedes' administrative action was a "sham." *Professional Real Estate Investors*, 113 S. Ct. at 1928.

[12] The Eleventh Circuit relied on the decision by the DMV, and its affirmance on appeal, in holding that the issue whether Mercedes had "violated" Section 320.643 by filing a complaint was *res judicata*. App., *infra*, 9a-12a. Thus, the filing and dismissal of Mercedes' complaint was the sole basis for the court's liability determination. Of course, neither the DMV nor the Florida District Court of Appeal had jurisdiction (or even the opportunity) to adjudicate Mercedes' First Amendment defense to the damages claim under Section 320.697 brought by respondents in this case.

of this Court and many lower courts on the appropriate scope of *Noerr-Pennington* immunity.

Although the *Noerr-Pennington* doctrine first arose in the antitrust context, this Court has applied the First Amendment principle underlying the doctrine in various other contexts. See *Bill Johnson's Restaurants*, 461 U.S. at 741-743 (labor law); see generally *Professional Real Estate Investors*, 113 S. Ct at 1927 (collecting cases). And many lower courts have expanded the *Noerr-Pennington* doctrine beyond the field of antitrust "to protect first amendment petitioning of the government from claims brought under federal and state laws * * *." *Video Intern'l Production, Inc.* v. *Warner-Amex Cable Comm'n, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988) (citing *Evers* v. *County of Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984), and *Gorman Towers, Inc.* v. *Bogoslavsky*, 626 F.2d 607, 614 (8th Cir. 1980)), cert. denied, 491 U.S. 906 (1989).[13]

The court in *Webb* v. *Fury*, 282 S.E.2d 28, 37 (W.Va. 1981), described the *Noerr-Pennington* doctrine as "a principle of constitutional law which bars litigation arising from injuries received as a consequence of First Amendment petitioning activity, regardless of the underlying cause of action asserted by the plaintiffs." In *Webb*, the court held that allegedly libelous statements in filings with the U.S. Department of the Interior and the U.S. Environmental Protection Agency could not, under the *Noerr-Pennington*

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[13] "In numerous cases, the courts have rejected claims seeking damages for injuries allegedly caused by the defendants' actions directed to influencing government action." *Brownsville Golden Age Nursing Home, Inc.* v. *Wells*, 839 F.2d 155, 160 (3d Cir. 1988) (citing cases); see, *e.g.*, *Havoco of Am., Ltd.* v. *Hollobow*, 702 F.2d 643, 650 (7th Cir. 1983) (defendants prompted SEC investigation); *Suburban Restoration Co.* v. *ACMAT Corp.*, 700 F.2d 98, 102 (2d Cir. 1983) (defendant sought injunction against award of public contract).

doctrine, be the basis for a subsequent damages action. 282 S.E.2d at 37-39.

Some courts, however, have resisted extending the *Noerr-Pennington* doctrine that broadly. For example, a panel of the Eighth Circuit in *In re IBP Confidential Business Documents Litigation*, 755 F.2d 1300, 1312 (1985), rev'd in part, 797 F.2d 632 (8th Cir. 1986) (en banc), specifically rejected the *Webb* court's formulation as overstating "the reach of the *Noerr-Pennington* doctrine." The court concluded that the doctrine had been expanded beyond the antitrust context only "to a limited extent,"[14] and did not shield defamatory statements "made in the course of petitioning the government." 755 F.2d at 1312-1313. On review en banc, the Eight Circuit reversed and held that the *Noerr-Pennington* doctrine may apply to defamation actions. 797 F.2d at 640. The Eighth Circuit subsequently noted that "the Supreme Court has never decided whether the *Noerr-Pennington* doctrine is applicable outside the antitrust area." *Hufsmith* v. *Weaver*, 817 F.2d 455, 458 (1987); cf. *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, 694 F.2d 466, 470-471 (7th Cir. 1982) (casting doubt on "decisions stat[ing] that the right to bring lawsuits, even of a purely commercial character, is protected by the First Amendment, as a form either of petition for redress of grievances, * * * or of speech"), cert. denied, 461 U.S. 958 (1983).

In *Whelan* v. *Abell*, 827 F. Supp. 801, 802-803 (D.D.C. 1993), rev'd, 48 F.3d 1247 (D.C. Cir. 1995), the district court granted judgment as a matter of law to defendants who had filed a state administrative complaint and a lawsuit based on, among other claims, an alleged violation of state franchise law and who were subsequently sued for tortious interference

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[14] The court cited as examples actions for "tortious interference with business" and for "alleged conspiracies under 42 U.S.C. § 1983, * * * and 42 U.S.C. § 1985." 755 F.2d at 1312-1313.

with prospective business advantage by the plaintiffs who were the subjects of the complaints. The court held that the defendants were immune from liability under the *Noerr-Pennington* doctrine, stating that "a person cannot be held liable as a result of his or her filing a good faith lawsuit or administrative claim or otherwise seeking governmental redress." *Id.* at 803.

On appeal, the D.C. Circuit reversed. The court noted the tension in the case law over the scope of the *Noerr-Pennington* doctrine outside the antitrust context, but declined to "set forth any kind of encyclopedic position on the relation between the common law torts at issue here and the *Noerr-Pennington* doctrine — or between them and the First Amendment regardless of the idiosyncracies of *Noerr-Pennington*." 48 F.3d at 1253-1254. Instead, the court simply assumed that even if the *Noerr-Pennington* doctrine applied to the torts alleged by the plaintiffs, the immunity would not extend so far as to protect the complaints filed by the defendants, which the plaintiffs alleged were "deliberately false." *Id.* at 1254.

The Eleventh Circuit's decision in this case compounds the confusion in the case law by going far beyond existing precedents and completely rejecting application of the *Noerr-Pennington* doctrine — notwithstanding the fact that this Court has clearly extended the reach of *Noerr-Pennington* immunity beyond the antitrust context to protect from liability defendants who file administrative petitions like the DMV complaint submitted by Mercedes.

The conflict in the lower courts on this issue compellingly indicates the need for this Court to address the reach of the *Noerr-Pennington* doctrine. As the Third Circuit recently observed in *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 435-443 (1994), cert. denied, 115 S. Ct. 735 (1995), this Court "has not discussed the scope of the constitutional right to petition in the context of an allegedly retaliatory discharge of a public employee." This case presents the

Court with an opportunity to address the scope of *Noerr-Pennington* immunity and resolve the split among the lower courts on this issue, which has been exacerbated by the refusal of the Eleventh Circuit to recognize Mercedes' First Amendment defense in this case.

II. THE COURT OF APPEALS ERRED IN FAILING TO CERTIFY TO THE FLORIDA SUPREME COURT THE NOVEL STATE LAW QUESTIONS RAISED UNDER THE AUTOMOBILE DEALER'S ACT

In imposing treble damages liability on Mercedes, the court of appeals resolved three important and undecided questions of Florida law: whether Taylor as a prospective franchisee had standing under the Florida Automobile Dealer's Act; whether Mercedes "violated" Section 320.643 by filing a complaint under the Act; and whether treble damages are mandated by the Act. As the dissent by Judge Hill admonished, however, these novel and important questions could have and should have been certified to the Florida Supreme Court.[15] App., *infra*, 16a-17a. The Eleventh Circuit's erroneous refusal to certify these dispositive state law issues to the state supreme court is contrary to this Court's precedents and the practice established in other circuits. This serious error by the court of appeals warrants review by this Court.

In fact, this Court has enthusiastically endorsed the use of state certification procedures. In *Lehman Bros.* v. *Schein*, 416 U.S. 386, 390-391 (1974), for example, the Court found certification to be "particularly appropriate" for state law questions that are "novel[]" and "unsettle[d]." Accordingly, the Court vacated a decision of the court of appeals that had declined to certify certain dispositive state law questions to the Florida Supreme Court. The Court's decision in *Lehman*

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[15] See Fla. R. App. P. 9.030(a)(2)(C), 9.15(a).

Bros. "is a clear direction to the courts of appeals to look favorably on the use of certification procedures in diversity cases." 1A MOORE'S FEDERAL PRACTICE ¶ 0.203[5] at 2159 (2d ed. 1995).

The benefits of state law certification are well documented. "[A]n adequate certification procedure 'does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism,'" (*Bellotti* v. *Baird*, 428 U.S. 132, 150-151 (1976), quoting *Lehman Bros.*, 416 U.S. at 391)). And this Court has repeatedly emphasized the important federalism and efficiency considerations that underlie certification:

> In a federal system, it is obviously desirable that questions of law which * * * are both intensely local and immensely important * * * be decided in the first instance by state courts. This may not always be possible nor is it always required, but where as here there is an efficient method for obtaining a ruling from the highest court of a State we do not hesitate to avail ourselves of it.

Elkins v. *Moreno*, 435 U.S. 647, 663 n.16 (1978). See also Note, *Erie R.R. and State Power to Control State Law: Switching Tracks to New Certification of Questions of Law Procedures*, 18 HOFSTRA L. REV. 421, 434 (1989) ("[w]hen a court fails to avail itself of the process of certification, the resulting burden may include unsettled areas of law, inconsistent holdings [by state and federal courts] and a return to the pre-*Erie* days of forum-shopping").

In light of the salutary effects of certification, this Court has often vacated and remanded decisions for certification of state law issues or certified the questions itself *sua sponte*. See, *e.g.*, *Virginia* v. *American Booksellers Assoc.*, 484 U.S. 383, 393 (1988) (Court orders certification to state supreme court); *Zant* v. *Stephens*, 456 U.S. 410 (1982) (Court orders certification to state supreme court); *Bellotti*, 428 U.S. at 151

(remanding with instructions to certify); *Mills* v. *Rogers*, 457 U.S. 291, 305-306 (1982) (vacating court of appeals' decision and remanding for consideration of certification); *Massachusetts* v. *Feeney*, 429 U.S. 66 (1976) (*sua sponte* certification); *Aldrich* v. *Aldrich*, 375 U.S. 249 (1963) (*sua sponte* certification); *Clay* v. *Sun Ins. Office Ltd.*, 363 U.S. 207 (1960) (vacating and remanding for certification); cf. *Kaiser Steel Corp.* v. *W.S. Ranch Co.*, 391 U.S. 593 (1968) (action stayed pending declaratory action in state court).

Many of the courts of appeals have agreed that certification is a useful procedure for resolving significant and undecided state law questions. Certification is a "potentially enormously helpful procedure under which * * * unresolved and important questions of state law may be referred to the court best equipped to provide answers to them." *Jones v. Heckler*, 754 F.2d 519, 520 (4th Cir. 1985). Thus, "the certification procedure is a valuable device for securing prompt and authoritative resolution of unsettled questions of state law." *Kidney* v. *Kolmar Laboratories, Inc.*, 808 F.2d 955, 957 (2d Cir. 1987). By invoking certification, "'both federal and state judicial systems are the beneficiaries of a procedure rooted in cooperative federalism.' * * * [Certification is supported by] our *Erie* duty * * * [and] principles of federalism." *Boardman* v. *United Services Auto Ass'n*, 742 F.2d 847, 848 n.1, 851 (5th Cir. 1984) (citation omitted), cert. denied, 474 U.S. 980 (1985).

In the face of these precedents, and this Court's "clear direction" to the courts of appeals in *Lehman Bros.* to seek certification of dispositive and unsettled state law issues in diversity cases, the Eleventh Circuit should have certified the novel state law questions at issue in this case to the Florida Supreme Court. The court's decision not to certify is conspicuously out-of-step with the prevailing trend favoring a liberal utilization of state certification procedures. It is particularly indefensible here, because Florida in fact pioneered the procedures for certifying state law questions

and has employed them with great success. See *Clay*, 363 U.S. at 212.

As the dissent below pointedly noted, it is the Florida Supreme Court that should render "the first interpretation of the questions raised by th[e] relatively obscure and unclear statute" at issue in this case. App., *infra*, 17a. Only that court can issue a "decisive and authoritative [interpretation], one on which the people of Florida can rely." *Ibid.* In fact, powerful issues of federalism and comity are implicated by the court of appeals' failure to certify the questions. The court below has construed an "obscure and unclear" state statute to *mandate* treble damages in excess of $15 million as a sanction for a franchisor's good faith petitioning of the Florida DMV for a determination as to which of several possible transferees was entitled to its franchise. Thus, with no guidance from the Florida courts, the court of appeals has interpreted an important state statute to have dramatic consequences for the motor vehicle industry in the State — consequences that likely were *not* intended by the Florida legislature and that likely would *not* have been accepted by Florida's highest court.[16] See *id.* 16a-17a (Hill, J., dissenting).

In these circumstances, review by this Court is necessary not simply to have the Florida Supreme Court clarify the important issues of state law at issue in this case but, more significantly, to establish guidelines on the use of certification by the courts of appeals. While this Court has frequently endorsed and utilized certification procedures on an *ad hoc* basis for disputed state law questions, it has never

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[16] For example, the Florida District Court of Appeal in *Gans* v. *Miller Brewing Co.*, 560 So.2d 281, rev. denied, 574 So.2d 140 140 (Fla. 1990), reached the opposite conclusion from the Eleventh Circuit on the question whether a prospective franchisee has standing under a directly analogous statute regulating beer distributorships.

propounded standards for certification to be followed in the thousands of federal cases each year in which such disputes potentially arise. And, as the court of appeals' decision (and the dissent) in this case compellingly demonstrate, such standards are clearly needed.

Indeed, the need for guidance from this Court is made more acute by the increased use of certification expected in light of this Court's decision in *Salve Regina College* v. *Russell*, 499 U.S. 225 (1991) (requiring de novo appellate review of district court determinations of state law); see Yonover, *A Kinder Gentler Erie: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 316-317 (1994). The availability of certification has grown enormously in recent years; at least 38 states have now adopted certification procedures, and a uniform state law has been promulgated. See Stern, APPELLATE PRACTICE IN THE UNITED STATES 171-172 (2d ed. 1989). Certification represents an effective and efficient means for implementing the policies of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and ensuring that the decisions of the lower federal courts are in accord with applicable state law. Without clarification from this Court, however, the circuits (like the Eleventh Circuit here) will grow increasingly disparate in their use of certification.

This Court's review is thus essential to enable state certification procedures to achieve their full benefits for cooperative federalism, informed decisionmaking, and judicial efficiency. As an alternative to plenary review, the Court may wish to vacate and remand the case to the court of appeals with instructions to certify the state law issues to the Florida Supreme Court, as the dissent below strongly urged. See cases cited at pages 22-23, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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